

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90
)

ORDER

Adopted: September 21, 2016

Released: September 21, 2016

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) denies a request for waiver of certain limitations regarding eligibility for support based on the Alternative Connect America Cost Model (A-CAM), and two requests for waiver of the deadlines that the Commission adopted in the *Rate-of-Return Reform Order* for filing FCC Form 477 data used in the final version of A-CAM.¹ Specifically, we deny Shawnee Telephone Company (Shawnee) and Moultrie Independent Telephone Company’s (Moultrie) petition for waiver of the Commission’s decisions: (1) to exclude census blocks served by fiber to the premises (FTTP) from the support calculations; and (2) not to make an offer of model-based support to any rate-of-return carrier that has deployed 10/1 Mbps broadband to 90 percent or more of its eligible locations in the relevant state.² We also deny Baraga Telephone Company’s (Baraga) request for waiver of the Commission’s March 30, 2016 deadline for submitting FCC Form 477 data used to determine a rate-of-return carrier’s percentage of broadband deployment for purposes of making the offer of A-CAM support.³ Finally, we deny the request of Clarity Telecom LLC dba Vast Broadband (Clarity) for waiver of the Commission’s deadline for submitting FCC Form 477 data used to identify census blocks served by FTTP or cable technologies.⁴

II. BACKGROUND

2. In the *Rate-of-Return Reform Order*, the Commission determined that it would exclude from support calculations those census blocks where an incumbent or any affiliated entity is providing

¹ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order et al., 31 FCC 3087, 3109, para. 56, 3113, para. 66 (2016) (*Rate-of-Return Reform Order*).

² Petition for Waiver of Shawnee and Moultrie, WC Docket No. 10-90, et al. (filed July 27, 2016) (Shawnee/Moultrie Petition); *see also* Letter from Richard R. Cameron, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al. (filed Aug. 15, 2016) (Shawnee/Moultrie Aug. 15, 2016 *Ex Parte* Letter).

³ Motion to Reconsider or, in the Alternative, Request for a Waiver of Certain Provisions within FCC 16-33, of Baraga Telephone, WC Docket No. 10-90 et al. (filed May 25, 2016) (Baraga Petition). To the extent Baraga Telephone is seeking reconsideration of decisions made in the Commission’s *Rate-of-Return Reform Order*, that issue will be considered by the Commission after the comment period closes. *See* 81 Fed. Reg. 55166 (Aug. 18, 2016).

⁴ Emergency Request for Expedited Treatment, Petition for Waiver of Deadline to Submit Form 477 Revisions, of Clarity, WC Docket No. 10-90 et al. (filed Sept. 8, 2016) (Clarity Petition).

10/1 Mbps or better broadband using either FTTP or cable technologies.⁵ For purposes of implementing this directive, the Commission directed the Bureau “to utilize June 2015 FCC Form 477 data that has been submitted and certified to the Commission prior to the date of release of this order.”⁶ The Commission also adopted a second eligibility limitation on the voluntary path to the model, concluding that any carrier that had deployed 10/1 Mbps or better broadband to 90 percent or more of its eligible locations in a state, based on June 2015 FCC Form 477 data that had been submitted as of the date of release of the *Rate-of-Return Reform Order*, would not be eligible for A-CAM support.⁷ The purpose of both restrictions was to target support to areas of greater need.⁸ The Commission deliberately adopted specific deadlines regarding the vintage of data to be used in those determinations so that carriers could not change their data after release of the order to evade these restrictions. Moreover, the Commission intended to impose administrative closure on the data set for incumbent study areas used to determine the support amounts offered to rate-of-return carriers that elect model-based support.

3. The Commission adopted a budget of up to an additional \$150 million annually to facilitate the voluntary path to the model.⁹ Carriers have until November 1, 2016 to indicate, on a state-by-state basis, whether they elect to receive model-based support.¹⁰

4. *Shawnee and Moultrie’s Petition for Waiver*. Shawnee and Moultrie request waiver of the Commission’s rules for determining which census blocks and which rate-of-return carriers are eligible for model-based support. Shawnee and Moultrie are affiliated and would both have to accept ACAM in Illinois. They claim that the current rules prevent them from electing model-based support because Shawnee has built FTTP to a substantial majority of its customer locations, reducing its A-CAM support “below a sustainable level,” and Moultrie currently serves more than 90 percent of its customer locations with 10/1 Mbps or better.¹¹ If the waiver request were granted, Shawnee and Moultrie estimate that their annual model-based support would be \$7.82 million, as opposed to 2015 projected legacy support of approximately \$10.5 million.¹² Shawnee and Moultrie assert that they would rather accept the predictability and administrative simplicity of model-based support, despite this reduction.

⁵ *Rate-of-Return Reform Order*, 31 FCC Rcd at 3109, para. 56 (concluding that “it is appropriate to make this adjustment to the model in order to advance our policy objective of advancing broadband deployment to unserved customers”).

⁶ *Id.*

⁷ *Id.* at 3113, para. 66 (“This will preserve the benefits of the model for those companies that have more significant work to do to extend broadband to unserved consumers in high-cost areas, and will prevent companies from electing model-based support merely to lock in existing support amounts.”). The *Rate-of-Return Reform Order* was released on March 30, 2016.

⁸ *Id.* at 3109, 3113, paras. 56, 66.

⁹ *Id.* at 3111, para. 60.

¹⁰ See *Wireline Competition Bureau Announces Support Amounts Offered to Rate-of-Return Carriers to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, DA 16-869 (WCB rel. Aug. 3, 2016); see also *Wireline Competition Bureau Releases Report for Alternative Connect America Cost Model with Minor Corrections*, WC Docket No. 10-90, Public Notice, DA 16-929 (WCB rel. Aug. 15, 2016).

¹¹ Shawnee/Moultrie Petition at 5. When Shawnee and Moultrie filed their petition, they stated that they were not sure if the statewide election requirement would apply, because they became affiliates in Illinois after the Commission adopted the *Rate-of-Return Reform Order*, but before the A-CAM offers of support were made. See *id.* at 2 n.5. They estimate that if Shawnee’s FTTP locations were eligible for support, their combined service territories could exceed the 90 percent threshold. *Id.* We clarify that the statewide election does apply, and under existing rules, Shawnee and Moultrie’s statewide offer is approximately \$1.4 million in annual A-CAM support.

¹² Shawnee and Moultrie state that their 2015 projected support is approximately \$10.5 million, and after accounting for the budget control requirements adopted by the Commission is projected to remain around \$10 million annually for the next several years. Shawnee/Moultrie Petition at 4 & n. 12.

5. *Baraga's Petition for Waiver.* Baraga requests waiver of the Commission's March 30, 2016 deadline for incumbent local exchange carriers (ILECs) filing FCC Form 477 data for use in the final version of A-CAM. Absent a waiver, Baraga would not be eligible to elect model support because A-CAM model results show that Baraga has deployed at least 10/1 Mbps to more than 90 percent of its eligible locations. Baraga claims that this does not accurately reflect its ability to deliver 10/1 Mbps within its study area because its competitive local exchange carrier (CLEC) affiliate's Form 477 data incorrectly included census blocks in Baraga's study area.¹³ Baraga explains that it had been over-reporting the availability of its ILEC's 10/1 Mbps broadband, and corrected this ILEC over-reporting in January 2016. Baraga states that its CLEC affiliate does not provide service within its study area, but it failed to correct the CLEC coverage when it revised its ILEC Form 477 data. Baraga filed revised CLEC data on May 25, 2016, and requests that we use the revised data to determine its eligibility to elect model-based support.¹⁴

6. *Clarity's Petition for Waiver.* Clarity also requests a waiver of the Commission's deadline for ILECs filing FCC Form 477 data for use in the final version of A-CAM. Clarity claims that when it revised its June 2015 Form 477 data on February 29, 2016 to include additional census blocks it had omitted in its initial filing, it incorrectly identified the technology as cable (code 42) in certain newly added census blocks rather than digital subscriber loop (DSL) (code 10). Clarity claims that this inadvertent error did not become apparent until after the release of A-CAM v2.3, when the revised June 2015 Form 477 data reduced support due to the inclusion of the census blocks erroneously indicated as offering cable modem service. Clarity filed a second revision on September 1, 2016, and requests that we include the revised data in A-CAM v.2.3, and grant its waiver prior to the November 1 deadline to submit A-CAM election notices.

III. DISCUSSION

7. *Shawnee and Moultrie.* We find that Shawnee and Moultrie have not demonstrated good cause warranting a waiver of the Commission's rules excluding census blocks served by FTTP from A-CAM support calculations and limiting eligibility for A-CAM support to rate-of-return carriers that have deployed at least 10/1 Mbps broadband to less than 90 percent of their eligible locations.¹⁵ We find that special circumstances do not exist in this case that would justify a waiver of the Commission's rules, nor do we find their public interest arguments persuasive.

8. We are not persuaded by Shawnee and Moultrie's argument that special circumstances exist because they are willing to accept less model-support than their current level of legacy support and would not receive any of the \$150 million in additional funding that has been budgeted by the Commission, which would create additional room within the budget for increases in support to other electing carriers. They argue that granting their waiver request would better serve the Commission's intended purpose than the rules themselves, and other rate-of-return carriers electing model support that have not yet deployed 10/1 broadband will benefit from the legacy support that Shawnee and Moultrie would forgo. We conclude that the fact that Shawnee and Moultrie appear to be willing to accept amounts less than their current support is not special circumstances. We do not expect that Shawnee and

¹³ Baraga files its ILEC and CLEC Form 477 data under two different FCC Registration Numbers (FRNs).

¹⁴ Baraga Petition at 5.

¹⁵ Generally, the Commission's rules may be waived for good cause shown. 47 CFR § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

Moultrie are the only companies that would opt to receive less model support in exchange for predictability and administrative simplicity. Companies that have already deployed broadband throughout their service areas may expect that their legacy support will decline in future years as their capital investment decreases substantially and may want to “lock in” a known, albeit lower, amount of support.¹⁶

9. Finally, we are not persuaded by their claim that the public interest would be better served by permitting these two carriers to elect incentive-based regulation and “redirecting ongoing federal high cost support under the A-CAM from areas where FTTP technology already provides robust broadband to areas where broadband is unavailable.”¹⁷ The Commission already found that it was in the public interest to exclude areas served by FTTP from support calculations to advance its policy objective of advancing broadband deployment to unserved customers, as it intended to preserve the benefits of the model for those companies that have more significant work to do to extend broadband to unserved consumers in high-cost areas.¹⁸ Shawnee and Moultrie have failed to offer any persuasive reason why waiver of that Commission decision is warranted here. If providing support to carriers where they have already deployed FTTP would better serve the Commission’s overall purpose to target support to areas of greater need, the Commission would not have adopted limitations on eligibility. Rather, it would have allowed companies that are largely built out to elect model-based support. Moreover, granting the requested waiver would result in the companies’ receiving significantly more support than the model would provide, lessening the amount contributed to the overall budget for the A-CAM path.¹⁹

10. *Baraga*. We find that Baraga has not demonstrated good cause warranting a waiver of the Commission’s deadline for filing FCC Form 477 data for use in the final version of A-CAM. We are not persuaded that Baraga and its customers will face an “unnecessarily draconian penalty” if Baraga is precluded from receiving model support because it made a mistake in overlooking the fact that filings made last year for its non-ILEC incorrectly contained ILEC census blocks.²⁰ Consistent with the Bureau’s decision in the *A-CAM Challenge Process Order*, we are not persuaded that special circumstances exist because an otherwise routine reporting correction impacts Baraga’s ability to elect model-based support to which it otherwise would be entitled.²¹ The fact that Baraga had filed both correct ILEC data and incorrect CLEC data does not distinguish their reporting errors from those of other providers. Based on what we have seen in the record, most filing errors include some correct data as well as errors. Other carriers are precluded from electing model-based support due to their own reporting errors and omissions. Nor do we find that the public interest would be served by waiving the Commission’s filing deadline. Precluding Baraga from receiving model support will not prevent it from deploying better services to unserved portions of its study area, including unserved Tribal lands, because

¹⁶ Shawnee and Moultrie claim that granting their waiver request would not produce any windfall for them or “lock in” high levels of legacy support based on sunk investment. Shawnee/Moultrie Petition at 9.

¹⁷ Shawnee/Moultrie Petition at 12.

¹⁸ *Rate-of-Return Reform Order*, 31 FCC Rcd at 3109, 3113, paras. 56, 66.

¹⁹ Based on their estimates, Shawnee and Moultrie “request that their model-based support be set at \$7.82 million.” Shawnee/Moultrie Petition at 5. If their request were granted, Shawnee and Moultrie’s transition support would be based on the difference between their 2015 support, approximately \$10.5 million and their model support. They estimate that the reduction in support would place them in Tier 2 of the Commission’s tiered transition framework. See Shawnee/Moultrie Aug. 15, 2016 *Ex Parte* Letter at 2 n.2. The Bureau estimates that the 25.5 percent difference between \$10.5 million and \$7.82 million would place them in Tier 3, which would result in a greater amount of payments.

²⁰ Baraga Petition at 4.

²¹ *Connect America Fund*, WC Docket No. 10-90, Order, 31 FCC Rcd 7790, at 7795 para. 16 (WCB 2016) (*A-CAM Challenge Process Order*) (denying request filed by Valley/Copper Valley to use Form 477 data filed after March 30, 2016). Valley/Copper Valley have filed an application for review of the Bureau’s decision.

it will continue to receive support under the embedded cost mechanisms, as reformed by the Commission, and will have associated broadband deployment obligations.²²

11. *Clarity*. We find that Clarity has not demonstrated good cause warranting a waiver of the Commission's deadline for filing FCC Form 477 data for use in the final version of A-CAM. We are not persuaded that special circumstances exist because an otherwise routine reporting correction impacts the amount of model support offered to Clarity.²³ Similar to our conclusion for Baraga, Clarity's situation is no different than the other carriers that made inadvertent reporting errors in their reported FCC Form 477 coverage that impacted support calculations. Nor are we persuaded that the public interest would be served by using the revised data to "bring the eligible number of locations back to a level similar to A-CAM v2.2."²⁴ Clarity is not different than any other eligible telecommunications carrier that wishes to expand broadband coverage. While we acknowledge the value of using accurate data, deadlines exist in administrative proceedings for a reason. The purpose of the deadlines adopted by the Commission was to impose administrative closure on the data set for incumbent study areas at a specific moment in time for the efficient implementation of the overall reform effort. Moreover, the Commission clearly stated that "carriers may not resubmit their previously filed data to reduce their reported FTTP or cable coverage."²⁵

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 214, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that this Order IS ADOPTED.

13. IT IS FURTHER ORDERED that the petition for waiver of the Commission's rules, filed by Shawnee Telephone Company and Moultrie Independent Telephone Company, IS DENIED as discussed herein.

14. IT IS FURTHER ORDERED that the petition for waiver of the Commission's rules, filed by Baraga Telephone Company, IS DENIED as discussed herein.

15. IT IS FURTHER ORDERED that the petition for waiver of the Commission's rules, filed by Clarity Telecom LLC dba Vast Broadband, IS DENIED as discussed herein.

16. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief
Wireline Competition Bureau

²² Baraga serves the Keweenaw Bay Indian Community. Baraga Petition at 4-5.

²³ See *-CAM Challenge Process Order*, at 7794-95, paras. 13-14 (denying requests of Miles Cooperative and Sharon Telephone to use Form 477 data filed after the deadline, which corrected technology codes in certain census blocks).

²⁴ Clarity Petition at 6.

²⁵ *Rate-of-Return Reform Order*, 31 FCC Rcd at 3109, para. 56.